No. 15348

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellant,

vs.

PORTER BARRETT,

Appellee.

APPELLANT'S OPENING BRIEF.

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I.
JURISDICTIONAL STATEMENT.

This action arose under the Federal Employers' Liability Act [45 U. S. C. A., Sec. 51, *et seq.,* R. pp. 4-6], and this appeal is prosecuted from the District Court's order denying appellant's motion under Rule 60(b), Federal Rules of Civil Procedure. The order denying relief was filed September 18, 1956 [R. p. 72], and appellant's notice of appeal therefrom was filed September 20, 1956 [R. p. 73]. Jurisdiction of the District Court is founded on Title 28, Section 1337, United States Code, and jurisdiction of this Court of Appeals is founded upon Title 28, Section 1291, United States Code. An order denying relief under Rule 60(b) is an appealable order (*Greenspahn v. Joseph Seagram* (C. A. 2d, 1951), 186 F. 2d 616; *Cromelin v. Markwalter* (C. A. 5, 1950), 181 F. 2d 948).

II.
STATEMENT OF THE CASE.

Appellee, Porter Barrett, filed this action to recover compensation for alleged injuries which he received on March 11, 1955, while he was working as a dining car waiter aboard the "Super Chief," a train owned and operated by appellant [R. p. 90]. Mr. Barrett testified that he was struck in the head by the door of a chill box; became dazed, but was not rendered unconscious; he experienced a sharp pain in the head but was able to complete his duties that evening [R. pp. 90-93]. The accident occurred the first night out of Chicago enroute to Los Angeles, but appellee finished his duties during the entire trip, and in fact continued to work without interruption for the next nine months, or to and including December 17, 1955 [R. p. 124].

For more than one month after the accident, Mr. Barrett did not seek care or treatment for his alleged injury. He first consulted a physician on April 17, 1955, [R. pp. 93, 113], and thereafter he saw several Santa Fe physicians during the months of April and May, 1955 [R. pp. 93-105]. Barrett received no further medical treatment or examinations from the end of May, 1955 until December 17, 1955 [R. p. 124]. At the trial his chief complaint was that of traumatic torticollis—a "tic" in the neck which caused him to continuously jerk his neck at intervals of approximately one each second [R. pp. 102, 103, 114, 123]. Barrett testified that he first experienced this jerking the end of May or the first of June, *after* he had stopped going to physicians [R. pp. 102, 124], and that the twitching had continued from that time to the present without change [R. p. 102].

During the months of June, July, August, September, October, November and December, 1955, Barrett worked each shift. He testified that his neck was twitching constantly; yet he sought no medical care or treatment [R. pp. 102, 124]. On December 17, 1955, approximately seven months after the onset of the torticollis, appellee sought the help of a physician and consulted Dr. Darrington Weaver [R. p. 45]. Dr. Weaver referred Mr. Barrett to Dr. Morris Goren, who testified at the trial that Barrett had "spasmodic torticollis" which "may last the rest of his life. It is a chronic condition." This testimony was based upon a history of twitching and tenderness of the head and neck from May, 1955 to December, 1955 [R. pp. 77-78].

Throughout the trial of this action, Mr. Barrett continuously twitched and jerked his neck. His testimony, both at the trial and during the taking of his deposition, was to the effect that he had no control over this torticollis, and that he twitched all the time; that he was "seldom wihout it." During the trial Mr. Barrett testified that the twitching condition had neither improved nor worsened; that he is unable to stop the twitching; and that he cannot say that at times it is not as great as others because he does not have any control over it and is not aware whether or not he is twitching [R. pp. 102, 125]. On his deposition Mr. Barrett stated that since May his head has been twitching almost continuously; that although it had not started when he was visiting the physicians in Chicago it started some time in May, and has continued all the time since then. *During that entire time the twitching has been occurring every few seconds* [R. pp. 219-220].

On the basis of what they heard and saw from Mr. Barrett, and the testimony of his physician (which was predicated upon the history given to him by Mr. Barrett) the jury returned a verdict in favor of appellee in the sum of $12,500.00, and judgment thereon was entered [R. pp. 8-10].

Yet a few days after the trial was concluded, and a few weeks after the trial was concluded, Mr. Barrett drove his automobile, visited and talked with his friends, walked down the street, went shopping, and performed other natural functions, *without a trace of the twitch which was so evident during the trial* [R. pp. 13-25; Exs. 1 to 7, incl.]. All of this can be observed by the court by viewing the motion pictures which have been submitted into evidence and which are available for the court to review. Mr. Barrett was secretly observed by William Perry on May 26, 1956, and by G. F. Richcreek on May 28, 1956. Mr. Richcreek obtained motion pictures which were later introduced into evidence as Exhibits 1, 2 and 3. During the time that Mr. Perry observed appellee, he found that Barrett neither twitched nor contorted his head or neck, and that he at all times appeared to be normal [R. pp. 13-15]. Mr. Richcreek's observation, which is substantiated by the motion pictures, disclosed that for the first two hours that appellee was under observation he neither twitched, contorted, nor otherwise unnaturally moved his head or neck, but that thereafter he began to twitch, and went to the offices of Dr. Darrington Weaver, who accompanied him to the office of Dr. Morris Goren [R. pp. 15-19]. Subsequently, we learned that Mr. Barrett had discovered that he was under observation by Mr. Richcreek while the investigation was being conducted [R. p. 33].

Because we suspected that Barrett had observed Richcreek in the process of taking motion pictures, the investigation was discontinued. On June 20, 1956, Mr. Barrett called at the office of appellant's counsel for the purpose of delivering certain papers which were needed in order to prepare the draft in payment of the judgment. While he was at counsel's office, Barrett twitched and jerked his neck in exactly the same manner as he had done during the trial. But immediately after leaving the offices, he stood in the hallway waiting for the elevator and neither jerked, twitched, nor otherwise contorted his neck or head [R. pp. 27, 31-32].

On June 25 and June 26, 1956, under cover motion pictures of appellee were taken by Mr. Joe Wilson Elliott. These films have been introduced into evidence as Exhibits 4, 5, 6 and 7. The affidavit of Mr. Elliott and the motion pictures reveal that on June 25 and June 26, 1956, at all times during Mr. Elliott's observation, Barrett neither twitched, contorted, nor otherwise unnaturally moved his head, but that he walked, talked, drove his automobile and conducted other activities normally [R. pp. 19-25].

The circumstances which originally aroused the suspicion, and which resulted in the investigation of Mr. Barrett, was the unusual interest in the case displayed by Dr. Darrington Weaver. Dr. Weaver neither treated nor prescribed for the appellee [R. p. 218], yet he was present and conferred with plaintiff's counsel during the trial, although he did not serve as a witness in any capacity [R. pp. 28, 47].[1] After the judgment was rendered, Dr.

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[1]Note that Dr. Weaver states that he was "* * * ready to testify if called upon * * *", but he does not state that he attended the trial for the purpose of giving testimony.

Weaver called at the office of appellant's counsel in order to personally deliver the satisfaction of judgment which had been executed before his wife, Clarice Weaver, a notary public. On another occasion Dr. Weaver telephoned appellant's counsel and urged that the payment of the judgment be expedited [R. pp. 28-31]. As a result of the unnatural interest of Dr. Weaver in the collection of the judgment, appellant investigated Dr. Weaver's background, and discovered that he had been convicted in 1942 on thirteen counts of violating Section 556 of the California Insurance Code,[2] one count of subornation of perjury, one count of perjury, and one count of forgery of a fictitious name—all in connection with the presentation of false claims to insurance companies for the purpose of obtaining compensation for persons who were not actually injured. It was also discovered that in 1931 Dr. Weaver had been convicted on five counts of violation of the California State Poison Act [R. pp. 62-71; *People v. Weaver,* 56 Cal. App. 2d 732].

Relying upon the evidence contained in the record on appeal and briefly outlined herein, appellant moved the District Court to vacate and set aside the judgment pursuant to the provisions of Rule 60(b), Federal Rules

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[2]California Insurance Code, Section 556, provides:

"It is unlawful to:

(a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance.

(b) Prepare, make, or subscribe any writing with intent to present or use the same, or to allow it to be presented or used, in support of any such claim."

of Civil Procedure, on the grounds that the judgment had been obtained by fraud, misrepresentation and other misconduct [R. p. 11]. Although the Honorable Trial Judge remarked "I will be candid to say that there are some strange things in it, the thing that caused you to become suspicious, the connection of Dr. Weaver, the mere fact that he is in the picture, that there is some suspicion * * *," the motion was denied, and the Judge stated that he could not be sure that the jury would return a different verdict had these facts been presented to it.

III.
SPECIFICATION OF ERRORS.

1. The Honorable Trial Court erred in failing to find as a matter of fact and law that the judgment in this case was obtained by appellee's fraud, misrepresentation and other misconduct.

2. The Honorable Trial Court erred in failing to find as a matter of fact and law that the judgment in this case was obtained by "other reasons" justifying relief from the operation of the judgment.

3. The Honorable Trial Court erred in denying appellant's motion for relief from the judgment upon the grounds stated in said motion.

4. The Honorable Trial Court erred in that it applied the criteria for determining a motion for a new trial rather than the criteria established for determining a motion for relief from judgment under Rule 60(b), Federal Rules of Civil Procedure.

IV.
SUMMARY OF THE ARGUMENT.

A. Judgments obtained through fraud, misrepresentation and other misconduct will be vacated.

Rule 60(b), *Federal Rules of Civil Procedure.*

B. Rule 60(b) is remedial and should be liberally construed.

Moore's Federal Practice, Vol. 7, Sec. 60.24[5], pp. 253-254;

Tozer v. Krause, 289 F. 2d 242 (C. A. 3, 1951);

Bridoux v. Eastern Airlines, 214 F. 2d 207, 210 (C. A. D. C., 1954).

C. Where perjury has played some part in influencing the court to render a judgment, the effect of the perjury will not be weighed on a motion to set aside the judgment.

Jungersen v. Axel Bros., Inc., 121 Fed. Supp. 712.

D. The record discloses that the judgment in this case was obtained by fraud, misrepresentation or other misconduct of appellee in conspiracy with Dr. Weaver.

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238, 88 L. Ed. 1250;

Rice v. Rice, 93 Cal. App. 2d 646;

Wood v. United States, 41 U. S. 342, 10 L. Ed. 987;

C. R. I. & P. Railway Co. v. Callicotte, 267 Fed. 799 (C. C. A. 8, 1920), *Cert. den.* 255 U. S. 570.

V.
ARGUMENT.

Rule 60(b) of the Federal Rules of Civil Procedure provides in part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, * * * for the following reasons: * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; * * * or (6) any other reason justifying relief from the operation of the judgment. * * *"

This rule is to be liberally construed. As stated by Professor Moore in *Moore's Federal Practice,* Vol. 7, Sec. 60.24[5], pp. 253-254:

> "Because Rule 60(b) is remedial and to be construed liberally, and because of the comprehensive sweep of 60(b)(3) any fraud, misrepresentation, circumvention or other wrongful act of a party in obtaining a judgment so that it is inequitable for him to retain the benefit thereof, constitutes grounds for relief within the intendment of 60(b)(3)."

In *In re Cremidas' Estate,* 14 F. R. D. 15, 17, the court stated:

> "Relief from judgments, orders, or other proceedings rests in the sound discretion of the court and that discretion should ordinarily incline towards granting, rather than denying relief."

A. The Fraud, Misrepresentation and Other Misconduct of Appellee.

In order to provide the court with a quick means of viewing the evidence upon which we rely, we have set forth in Appendices A and B a diagrammatic representation of the conflicting acts and testimony of appellee which we contend establishes fraud, misrepresentation and other misconduct.

When Mr. Barrett's deposition was taken on March 7, 1956, his head was twitching almost continuously. Barrett said that it had been that way since May, 1955; that his head twitched all the time and he was seldom without the twitching. He denied his ability to control the twitching, and he testified that the twitching did not start until after he had finished seeing the physicians in Chicago [R. pp. 219-220].

At the trial Barrett testified that the neck jerking started the last of May or the first of June and that it has continued since that date without change [R. p. 102], but that he saw no physician for this condition until December, 1955 [R. p. 124]. Furthermore, throughout the proceedings while appellee sat at counsel table or on the witness stand before the jury, he contorted and twitched his neck with sudden, short jerks, all of which was visible to the court and the jury at all times.

Yet, after the jury verdict was returned, Barrett appeared completely normal and without any trace of the twitching or jerking except on those occasions when he knew he was being observed. This "sudden recovery" of Mr. Barrett is not mere coincidence. Barrett's fraudulent intent and motive are made clear when one considers that whenever Barrett knew he was being observed by

an agent or representative of the appellant railway company, he promptly reverted to the same twitching activity he had displayed during the trial, but when he thought he was no longer being observed, the twitching and other abnormalities promptly disappeared and he was again normal. Although Barrett jerked violently when he visited the office of appellant's counsel on June 20, 1956, he made a rapid recovery when he stepped into the hallway and walked down to the elevator [R. pp. 15-19, 28-34].

The close association and uncommon interest of Dr. Darrington Weaver in this case [R. pp. 25-26, 28-34] adds to the proof that deliberate misrepresentations were made for the purpose of perpetrating a fraud on the court. Dr. Weaver was convicted in 1941 and sentenced to Folsom Prison on fifteen counts of committing frauds on insurance companies in order to obtain money for himself and others through false and fraudulent injury claims. In each case he used a layman to make the claim, he instructed the layman in the manner of presenting the claim and he prepared and submitted to the insurance company the "medical report." (*People v. Weaver,* 56 Cal. App. 2d 732.)

Barrett saw Weaver on December 17, 1955 [R. p. 216]. In the spring of 1955, Barrett had been to several physicians in Chicago, but that was before he twitched or complained of twitching. The onset of the twitching was in June, 1955, *after* he had seen these physicians.

It was Dr. Weaver who referred Barrett to Morris Goren, the physician who testified during the trial [R. p. 88], and Dr. Goren said he first saw Barrett on December 27, 1955, ten days after Barrett's first visit to Weaver [R. p. 76]. Through Dr. Goren we have the

first medical testimony of the appellee's head jerks. Dr. Goren testified that when Barrett came to his office on December 27, 1955, he complained of twitching and tenderness of the head and neck [R. p. 76].

Whereas Dr. Weaver remained in the background and did not testify at the trial, he was present at the trial as a spectator and advisor, he ran errands for appellee after the trial, he inquired concerning the payment of the judgment, and he used his wife to notarize the satisfaction of judgment [R. pp. 28-34]. Dr. Weaver displayed an interest in the trial and the collection of the judgment different than that which one would expect from a doctor of medicine whose professional services had been engaged. His interest more than suggests that he has something substantial to gain as a result of the judgment. This, when considered along with the doctor's past record of perpetrating frauds on insurance companies, and the "coincidence" that appellee never complained of his torticollis to physicians between June, 1955 and December, 1955, before he saw Dr. Weaver, and appellee's rapid recovery after the trial (except when he is aware that he is being observed), establishes that the judgment was obtained by fraud, misrepresentation and other misconduct of the appellee. The remarks of Mr. Justice Story in *Wood v. United States,* 41 U. S. 342, 359-361, 10 L. Ed. 987, are apropos:

> "* * * for fraud, being essentially a matter of motive and intention, is often deductible only from a great variety of circumstances, no one of which is absolutely decisive; but all combined together may become almost irresistible as to the true nature and character of the transaction in controversy."

The case of *Chicago, Rock Island & Pacific Railway Co. v. Callicotte,* 267 Fed. 799 (C. C. A. 8, 1920), *Cert. den.* 255 U. S. 570, is particularly in point. In that case the plaintiff, an employee of the defendant railroad company, obtained a judgment in the state court for alleged paralysis of his lower limbs. Defendant moved the state court for a new trial, and an arrest of judgment. These motions were denied. Defendant then petitioned the court to review the matter under a writ of *coram nobis.* This was also denied. Its appeal to the State Supreme Court resulted in an affirmance of the judgment, and the railroad then brought this action in equity in the Federal Court for the purpose of enjoining the enforcement of the judgment on the grounds that it had been obtained by fraud and conspiracy, in that the plaintiff feigned his injury. The District Court denied relief, but the Court of Appeals reversed, and in so doing stated:

> "We may even assume that he [plaintiff] had true paralysis on these several occasions [when examined by physicians] if possible, but the fact remains that in the intervals he had the use of his legs and had been seen and known to use them on many occasions. Yet this true history of the case was, by a conspiracy, concealed from the defendant; the false history of the case was given to the various doctors for the defendant, and even to one of the plaintiff's doctors * * *. On this false and fraudulent foundation these medical experts rested their conclusion * * * the jury was deceived; the court was deceived * * * all by this conspiracy and fraud, a fraud consisting not merely in the testimony of plaintiff on the trial but also in this concocted plan outside of court, pursuant to which a false history of the case was made up and proclaimed."

All of the remarks of the court in *Callicotte* are applicable to the case at bar. Even if we should assume that Barrett had a true torticollis on the several occasions he was examined by physicians, it remains a fact that in the intervals Barrett did not twitch or jerk his neck, but the true history of the case and the true condition of the appellee was by a conspiracy concealed from the appellant, the jury, and the court. Everyone was deceived by appellee's false testimony.

The California decisions are appropriate in considering a motion under Rule 60(b), since the rule was historically based upon Section 473 of the California Code of Civil Procedure.

See *Moore's Federal Practice,* Vol. 7, Sec. 60.10[1], [6] and [7], pp. 10-11, 16-21.

Particularly applicable to the facts presented herein is the case of *Rice v. Rice,* 93 Cal. App. 2d 646 (1949). There, the defendant husband in an action for divorce, had testified during the trial in a manner which *made it appear* that he had title to a certain piece of real property, the status of which (community or separate) was in issue. However, the husband had actually testified that the property was *not* in his name! The trial court had divided up the property on the assumption that the property was in the name of the husband, and the plaintiff brought a motion under Section 473 of the Code of Civil Procedure to set aside the judgment because in truth and in fact the husband had transferred the property to a third person before the trial. The motion was granted, and the District Court of Appeal affirmed, stating:

> "Good faith on the part of the defendant required that he inform the court that he had conveyed the property to Davis. Under the circumstances here,

> the conduct of defendant constituted a fraud upon the court. The court has inherent power to set aside a judgment obtained through fraud perpetrated upon it. * * * As above stated, the motion herein was made under the provisions of § 473 of the Code of Civil Procedure."

In the case at bar, appellee not only testified that the twitching and jerking was present at all times; he not only gave such a history to his physician, upon which the medical opinion was predicated; but his actions throughout the trial, throughout the taking of his deposition and at other times when he was being observed made it appear beyond question that the twitching and jerking was present during all of his waking hours.

B. The Motive and Intent and the Complicity of Dr. Darrington Weaver.

Dr. Weaver's close relationship to this case and his past record of perpetrating frauds on insurance companies were properly before the District Court, and are relevant to the questions herein presented. Former fraudulent acts are evidence of lack of good faith, which is equivalent to an admission, and the recurrence of false claims of a similar sort tends to negative good faith in the present claim and thus show an intent to make a false claim.

> *Wigmore on Evidence* (3rd Ed.), Vol. II, Sec. 340, p. 241.

This rule of evidence has been established by the United States Supreme Court. The earliest decision is that of *Wood v. United States,* 41 U. S. 342, 359-361, 10 L. Ed. 987.

See, also, *Butler v. Watkins,* 80 U. S. 456, 464, 20 L. Ed. 629, wherein the court stated:

> "* * * Actual fraud is always attended by an intent to defraud, and the intent may be shown by any evidence that has a tendency to persuade the mind of its existence. Hence, in actions for fraud, large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at about the same time, and in relation to a like subject, was actuated by the same spirit."

The courts in the Ninth Circuit have applied this rule of evidence. In *Knudsen v. Domestic Utilities,* 264 Fed. 470, 474 (C. C. A. 9, 1920), this court stated:

> "* * * in our opinion the court below was in error in excluding evidence proffered by the plaintiffs to show that the defendants had committed like frauds upon others. * * * In determining the existence of fraud, 'great latitude is allowed in the introduction of evidence.' * * *"

See, also:

Baldwin v. Warwick, 213 F. 2d 485, 486 (C. A. 9, 1954);

Jones v. United States, 162 Fed. 417, 427 (C. C. A. 9, 1908);

United States v. Lumantes, 139 Fed. Supp. 574 (N. D. Cal., 1955); and

Bowles v. Jung, 57 Fed. Supp. 701, 709 (S. D. Cal., 1944).

Professor Moore has put the matter this way:

> "Suppose, however, that the fraud, misrepresentation or other misconduct is not that of the moving

party, but is that of a third person. If the wrong of the third person is fairly attributable, under general legal principles, to the party for whom judgment went, then the fraud, misrepresentation, or other misconduct is legally that of the prevailing party, and 60(b)(3) applies."

Moore's Federal Practice, 60.24[5], p. 255, Vol. 7.

Dr. Weaver's past transgressions are fully set forth in the reported decision in *People v. Weaver,* 56 Cal. App. 2d 732. It will be observed that Dr. Weaver not only fabricated false claims (using a layman as the ostensible claimant), supported these claims with false medical reports and received the payments by the insurance companies, but he also testified in court concerning an alleged broken arm of one of the claimants and used an X-ray of the broken arm of another person, contending that it was an X-ray of the arm of his co-conspirator, the plaintiff in that case. This is the same Dr. Weaver who sent Porter Barrett to Dr. Morris Goren; the same Dr. Weaver who was present in court consulting with appellee's counsel during the trial of this action; who personally delivered to the office of appellant's counsel the Satisfaction of Judgment signed by the appellee and his counsel; who later telephoned counsel for appellant urging the latter to obtain the check from the Santa Fe as soon as possible. Barrett testified that Dr. Weaver did not treat him, he just "consulted" with him and referred him to Dr. Morris Goren. Yet Dr. Weaver remained actively interested in the case from a legal viewpoint, if not a medical one.

C. The Trial Court Applied Erroneous Standards of Judgment in Passing Upon Appellant's Motion.

The learned trial judge denied appellant's motion under Rule 60(b) because he was not satisfied that the jury would have returned a different verdict even had they heard the additional evidence presented by appellant [R. p. 180]. The judge remarked: "I will be candid to say that there are some strange things in it, the thing that caused you to become suspicious, the connection of Dr. Weaver, the mere fact that he is in the picture, that there is some suspicion * * *" [R. p. 178], but he considered that the motion should be denied because "if the jury were trying the case today and weighing the evidence and had everything presented to them that we have at this time, assuming that that were possbile, I am not sure that they wouldn't come in with the same verdict that they came in with before." [R. p. 179.]

We respectfully submit that these remarks of the trial judge indicate that he failed to grasp the significance of this motion under Rule 60(b), and thus unintentionally abused his discretion in denying that motion. In support of this we call the court's attention to the case of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 246, 88 L. Ed. 1250, wherein the Supreme Court stated:

> "Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."

The District Court, following the *Hazel-Atlas Glass* case, in *Jungersen v. Axel Bros., Inc.*, 121 Fed. Supp. 712,

717 (D. C. N. Y.) *aff'd* 217 F. 2d 646, *cert. den.,* 349 U. S. 940, stated:

> "Where perjurious testimony in furtherance of a premeditated plan or conspiracy has played some part in influencing the court to render a judgment which it would be unconscionable to enforce, the effect of such testimony will not be weighed in a suit in equity to set aside that judgment. *Hazel-Atlas,* supra. The testimony will be deemed material as a matter of law, since it was offered to defraud the court, and achieved that end."

Thus we conclude that it was not pertinent for the trial judge to consider what effect appellee's perjury might have had on the size of the judgment where, as here, "the very temple of justice has been defiled."[3] We contend that "* * * the court below applied a standard of strictness rather than one of liberality in concluding that justice did not require that the judgment be set aside." (*Tozer v. Krause,* 189 F. 2d 242 (C. A. 3, 1951).)

See, also:

Bridoux v. Eastern Airlines, 214 F. 2d 207, 210 (C. A. D. C., 1954).

We submit that it is important for this court to articulate the standard by which the District judges must decide motions under Rule 60(b)(3), and we contend that such standard is not equivalent to the one used for passing upon a motion for new trial. The trial judge must use his discretion, but that discretion can only operate within a framework of fixed guideposts. Should the trial judge

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[3]Mr. Justice Frankfurter in *Universal Oil Products v. Root,* 328 U. S. 575, 90 L. Ed. 1447.

in exercising his discretion fail to recognize the limitations of that discretion, his decision becomes arbitrary, irrespective of the fact that he has attempted to be fair to both parties. It is for the Appellate Court to direct the "approach".

In the world of the market place, where greed and ambition motivate the minds and actions of men, we tolerate much chicanery, viciousness and ruthlessness. In fact, in the popular mind, these qualities are sometimes encouraged, and one may be considered to be weak or stupid if he foregoes an immediate advantage in order to express honor or consideration. Yet, we train our youths in good sportsmanship because this always will be the basis of a good society.

In the courts we have reposed the duty of moral guardianship. Our courts have always recognized the frailties of mankind and the practical demands made upon businessmen in a competitive economy. In this field the courts have been loath to apply that concept of fair dealing which they apply in fields of trusts and other fiduciary relationships. Yet even in business, the legislature and the courts hold the public to a much higher duty of "fair dealing" than they did in other days. Examples are the demise of the doctrine of *caveat emptor,* the laws which forbid misleading advertising, and the laws pertaining to unfair competition. The tendency has been for the courts to demand a higher standard of conduct from people in their dealings *inter se.*

How much more important is it for these same courts to demand impeccable conduct in the use of their own processes? The desire for a final judgment—the termination of litigation—should not be so great that misleading statements and conduct of parties, made for the purpose of

gaining an unfair advantage by leaving the jury with a misapprehension of the facts should be tolerated by our Courts. In the words of Judge Clark, in *Publicker v. Shallcross,* 106 F. 2d 949, 952 (C. A. 3, 1939):

> "We believe truth is more important that the trouble it takes to get it."

Conclusion.

It is respectfully submitted that in the interests of justice, and in the interest of upholding the sanctity of the law and its "temples of justice", the order denying appellant's motion under Rule 60(b) should be reversed, and the trial judge should be instructed to vacate the judgment upon such terms as are just. (See *Fleming v. Mante,* 10 F. R. D. 391, 392.)

Respectfully submitted,

Robert W. Walker,

Louis M. Welsh,

Attorneys for Appellant.

APPENDIX A.

Actions of Appellee.

Before and During the Trial, and When Conscious of Being Observed.	After Trial, and While Not Conscious of Being Observed.
1. Mr. Barrett twitched every few seconds during the taking of his deposition [R. pp. 219-220], and he twitched continuously during the trial [R. pp. 102, 103, 114, 123, 125].	1. Under cover observation of appellee on May 26, 1956 discloses that he neither twitched nor contorted, and appeared completely normal [R. pp. 14-15]. Under cover observation on June 25, 1956 discloses that he neither twitched nor contorted, and appeared completely normal [R. pp. 20-21]. Under cover observation on June 26, 1956 discloses that he neither twitched nor contorted and appeared completely normal [R. pp. 22-24].
2. On May 28, 1956, after he learned that he was being observed [R. p. 33], appellee again started to twitch [R. pp. 18-19].	2. Under cover observation on May 28, 1956 discloses that he neither twitched nor contorted and appeared completely normal, until he became conscious of the fact that he was being observed [R. pp. 16-18, Exs. 1, 2 and 3].

Before and During the Trial, and When Conscious of Being Observed.	After Trial, and While Not Conscious of Being Observed.
3. On June 20, 1956, while appellee was present at the office of counsel for appellant, he twitched and contorted his neck in the same manner as he had done during the taking of his deposition and at the trial [R. pp. 27, 31-32].	3. On June 20, 1956, after appellee had departed from the office of counsel for appellant and while he was not aware that he was being observed, he neither twitched nor contorted nor jerked his neck, and appeared to be perfectly normal in all respects [R. p. 32].*

*Although Mr. Barrett stated in his affidavit that he has reviewed appellant's affidavits [R. p. 48], he nowhere denied that he twitched his neck continuously while at counsel's office, but then "suddenly recovered" after he walked into the hallway, where he stood in a perfectly normal manner awaiting the elevator.

APPENDIX B.

Statements of Appellee.

Testimony Before and During the Trial:	Testimony After the Trial:
1. During this deposition and since May of 1955 my head has been twitching almost continuously. It twitches all the time, I am very seldom without it [R. pp. 219-220]. I am unable to stop the twitching, I do not know if sometimes it is not as great as others because I do not have control of it. I don't know sometimes whether I am doing it or not doing it. I don't pay too much attention to it [R. p. 125].	1. During the trial I testified that I was seldom free from the twitching and by that I meant that at times varying from 1 to 4 hours I did not jerk [R. p. 49].
2. I am never without it (the twitching) unless I am asleep and don't know about it [R. p. 50].	2. During times of stress such as the trial, taking of deposition, seeing doctors or lawyers, the jerking is worse [R. p. 49].
I do not know what would aggravate the twitching and I know nothing that diminishes the tendency to the twitching [R. pp. 50, 56].	

Testimony Before and During the Trial:

3. I go to Dr. Darrington Weaver about three or four times a week. He never treated me for anything. He only talked to me. Well, you call this consultation, he sit and talked to me, it seemed to kind of relieve my thoughts and head and mind [R. p. 218]. Dr. Weaver did not treat me. He recommended that I go to see Dr. Morris Goren [R. p. 103].

Testimony After the Trial:

3. At no time has Dr. Weaver advised me what to do. At no time have I conspired with Dr. Weaver to exaggerate my injuries [R. p. 49].